Forms Corporation of America *and* Local 415-S Graphic Communications International Union, AFL–CIO. Cases 33–CA–9369 and 33–CA–9392

November 14, 1994

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On January 21, 1993, Administrative Law Judge Elbert D. Gadsden issued his decision in this proceeding. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

On September 21, 1993, the Board issued a Decision and Order Remanding this proceeding to the judge for the limited purpose of making credibility findings on two issues: (1) whether employee Steve Shelton called in sick on February 18, 1991; and (2) whether Plant Manager William Barclay told Shelton on February 21, 1991, that he need not call in until the morning of the day that he would be returning to work.[1]

On February 14, 1994, Judge Gadsden issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order of Judge Gadsden's January 21, 1993 decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Forms Corporation of America, Spring Grove, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Will Vance, Esq., for the General Counsel.
John S. Schauer, Esq. (Seyfarth, Shaw, Fairweather & Geraldson), of Chicago, Illinois, for the Respondent.
Susan Brannigan, Esq. (Asher, Gittler, Greenfield, Cohen & D. Alba, Ltd.), of Chicago, Illinois, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. This supplemental decision is issued pursuant to a September 21, 1993 Decision and Order of the National Labor Relations Board, remanding the proceeding in the case to me, for the limited purpose of making specific findings of fact and credibility resolutions concerning the testimony of Steve Shelton and Respondent's witnesses as to Shelton's alleged telephone call on February 18, and his alleged conversation with Plant Manager Barclay on February 21; and if appropriate, make revised conclusions of law and recommendations concerning Shelton's discharge, allegedly in violation of Section 8(a)(3) and (1) of the Act.

In compliance with the Board's Order, I have not only taken into consideration the evaluative factors outlined under the topic ''Transfer of Laswell,'' on page 18 of his decision of January 21, 1993, but also on the work history of Shelton and Paul Laswell, including the advent of their union organizing activities and Respondent's reactions thereto.

A review of the evidence of record shows that Steve Shelton was employed by the nonunionized Respondent January 25, 1984, and worked as a pressmen under the supervision of James (Jim) DiTusa. As the evidence of record further shows, in October 1990, Shelton and Laswell met with union organizers about organizing a union at the plant. Thereafter, and during November 1990, both Laswell and Shelton openly engaged in union organizing activities at the gate of the plant, as well as inside the plant. Their organizing activities included posting union labels and literature on their toolboxes, distributing union authorization cards, soliciting employees signatures on the card, wearing union badges in the plant, and other activities as further summarized in detail on pages 6 and 24 of my January 19, 1993 decision.

The credited evidence shows that management had actual knowledge of Laswell's union organizing leadership as early as the first week in December 1990 and of Shelton's union organizing leadership as early as January 3, 1991. Laswell and Shelton were harassed by members of management on several occasions prior to the union election held January 24 and 25, 1991. The Union lost the election and Shelton told certain discouraged employees they would have another opportunity to vote for the Union after a period of 1 year and

[1] 312 NLRB 269.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Here the judge based his findings not only on the demeanor of the witnesses, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. In particular, we agree with the judge's finding that Steve Shelton did not accumulate the seven points warranting discharge pursuant to the Respondent's attendance policy prior to his termination on Wednesday, February 27, 1991. Shelton had accumulated three points when he called in sick on Monday, February 18, 1991, and accrued a fourth point as ''absent with notice,'' on that day. Shelton accrued a fifth point with a similar call the next day. However, Shelton accrued no further points that week because the Respondent viewed his absence as a continuing illness and Plant Manager William Barclay told Shelton on Thursday, February 21, 1991, that he need not call in until the morning of the day he would be returning to work. Shelton did this on Wednesday, February 27, 1991. At this time, Shelton had five points, two points fewer than the number required for discharge and five points fewer than the number alleged by the Respondent. The Respondent therefore failed to rebut the General Counsel's prima facie case that Shelton's discharge was discriminatory. The judge correctly found pretextual the Respondent's assertion that Shelton was discharged because he accumulated more than seven points pursuant to the Respondent's attendance policy.

management knew both union organizers were determined to unionize Respondent. On February 15, 1991, only 3 weeks after the union election, Laswell was abruptly, discriminatorily, and unlawfully transferred from the second to the first shift, even though he had informed Respondent that he preferred the second shift when he was hired.

A. *Did Shelton Call in February 18?*

Although Respondent has had a policy on employee absences since 1986, Respondent did not install a telephone in the center of the plant's floor until mid-January 1991, approximately 10 days before the union election, for employees to call in when they are going to be absent.

Steve Shelton testified he called in on the phone Monday, February 18, 1991, and fellow press operator Dan Breen answered the phone. Shelton said he told Breen he was sick and would not be in, and Breen said he would inform the proper persons.

Supervisor DiTusa acknowledged Shelton told him he had called in February 18 and informed Breen he was sick, but said he (DiTusa) did not receive the message from Breen on that date. DiTusa further stated that when he later asked Breen had he taken a sick call from Shelton, Breen said ''Yes,'' but he did not give him a date. It is particularly noted that DiTusa did not say he asked Breen for the date of the call or that he tried to establish the date of the call. It is also noted that DiTusa nevertheless concluded that Shelton did not call in February 18. Such an arbitrary conclusion in the face of the message DiTusa had received from Breen was certainly not objective, and in all probability was colored with DiTusa's union animus he (Respondent) had previously manifested toward Shelton during the union campaign.

Supervisor DiTusa testified that during Shelton's exit review, Shelton told Resource Manager Ellie McEwen that he had called in February 18 and informed Breen he was sick and would not be in, and McEwen said she did not receive the message. According to DiTusa, McEwen said she had previously asked Breen had he received a call from Shelton and Breen told her he took one but did not state what date. Again, DiTusa does not say whether he or McEwen asked Breen for the date. So it is at least clear that DiTusa acknowledged Breen told him Shelton had called in sick during the week of February 18.

McEwen testified in her own right, that Breen told her Shelton had called in sick Tuesday, February 19, and that he gave the message to Supervisor Don Lee. Production Manager Bill Barclay testified that Supervisor Don Lee told him Shelton had called in February 19. Although employee Dan Breen and Supervisor Don Lee are still in Respondent's, employ, neither Breen nor Lee appeared and testified in this proceeding. No explanation was offered for their nonappearance. Consequently, the individual, self-serving hearsay testimonial accounts of McEwen and Barclay are not corroborated.

It is particularly noted that Supervisor DiTusa testified that McEwen said she had previously asked Breen had he received a sick call from Shelton and Breen told her he took one call but did not state the date. However, McEwen, testifying in her own right, said Breen told her Shelton had called in sick Tuesday, February 19, and she gave the message to Supervisor Don Lee. Again, although employee Dan Breen and Supervisor Don Lee are still in Respondent's employ, neither Breen nor Lee appeared and testified in this proceeding. No explanation was offered for their nonappearance. Consequently, the individual, self-serving hearsay testimonial accounts of McEwen and Barclay are not corroborated.

In other words, it is clear that Managers McEwen and Barclay appeared in this proceeding to support the untruthful position of Supervisor DiTusa, so that management could stringently apply its absence policy in an effort to make its discriminatory discharge of Shelton appear legitimate and justifiable. Additionally, Shelton's timecard for February 18 was marked ''AWON'' (absent without notice) in the Monday, February 18 column, and initialed by Supervisor DiTusa. However, in the same column appears blue ink marks, showing that something was well scratched out. I considered the apparent scratched over marks significant and more than coincidental, because of the conflict in Shelton's testimony that he called in that day, and Respondent's denial that Shelton had called in. The scratched marks are even more significant because Supervisor DiTusa first testified he did not notice the marks when he initialed Shelton's card at 4 p.m. February 18. On further examination however, DiTusa changed his testimony and said the apparent scratched out marks were already on the card when he initialed it, that he had no explanation for its presence, and that he alone is responsible for recording calls related to attendance.

Based on the aforedescribed circumstances, I find that it may be reasonably inferred from such circumstances that the apparent scratched out marks on the timecard indicated Shelton had called in to report he was ill on February 18 and the card was previously marked AWN (absent with notice); and that in order to make it appear Shelton had not called, DiTusa subsequently scratched over AWN and wrote in AWON and initialed it.

Moreover, I was persuaded by the demeanor of Shelton, as well as by the abundance of the credited evidence of record, that he testified truthfully, and that DiTusa, McEwen, and Barclay did not testify fully, accurately, or truthfully about the telephone call from Shelton on February 18. Consequently, I credit Shelton's account and discredit the accounts of DiTusa, McEwen, and Barclay, and find that Shelton called in February 18 and informed Breen he was ill and would not be in; and that Breen relayed Shelton's call-in message to Supervisor DiTusa as he promised Shelton he would do. This conclusion is further supported by the apparent scratched out marks in the February 18 column on Shelton's timecard, as well as by the overwhelming evidence of Respondent's antiunion attitude toward Shelton and Laswell, the two leading union organizers in the plant, of which fact Respondent was fully aware.

B. *The February 21 Telephone Conversation Between Shelton and Manager Barclay*

The testimony of both Shelton and Manager Barclay about their telephone conversation on Thursday, February 21, is highly conflicting.

Manager Barclay testified Shelton called him on Thursday, February 21, and told him he (Shelton) had to have his medication changed and hoped he would get well over the weekend; and that he would be out until Monday, February 25. Barclay said he replied, ''OK, be sure to call me and I will

look to see you on Monday, February 25, doctor's orders.'' Barclay said he recorded the call in the logbook (R. Exh. 12).

However, Shelton testified he did not call in on February 21 because he visited his doctor that day and was given a prescription medication. When he returned home and took the medication, he said he fell asleep. Around 4:30 p.m. he said he received a telephone call from Manager Barclay who asked why had he not called in. Shelton said he told Barclay about the medication, his falling asleep, and that the doctor told him to stay home until at least February 25. If he was still sick on that date the doctor told him he would extend his time off. Shelton said Barclay then told him to call in every day and he (Shelton) said he reminded Barclay how he had been out sick for an extended period of time in 1988 and did not call in every day. Barclay did not dispute the latter statement by Shelton. Shelton said he also told Barclay he believed you only had to call in once if you are out for extended illness, and he asked Barclay what did he want him to do. After a pause, Barclay said, ''OK, on the morning of the day you are going to return to work, call me so I can schedule you back to work.'' Shelton said he told Barclay he would do that. However, Barclay denies he ever gave Shelton such instructions. Instead, he said he simply told Shelton to be sure to call when he was to return to work and he would look to see him on Monday, February 25.

It is noted that the February 21 telephone conversation between Shelton and Manager Barclay was not a simple conversation about who called whom regarding Shelton not being at work that day, but that it also involved a discussion about Respondent's absence or call-in policy, as well as when Shelton was going to return to work.

Although Shelton testified he did not call in February 21 and then testified that he did call in February 21, he explained he called for insurance forms on February 21 but that Manager Barclay called him late in the afternoon of February 21, when they discussed his return to work. As I observed Shelton testify, I believed his explanation for the slight confusion about his calling in because I was persuaded it was an honest mistake of accuracy in trying to recall dates and times, in a case in which there were several dates and times of telephone calls which were discussed during the period February 18 and 26. I also find it difficult to believe Shelton would have testified he did not call in to report he would not be in on February 21, if in fact, he had called in, because his failure to call in was not in his best interest. So he told the truth, and stated he fell asleep until Manager Barclay called him around 4 p.m. on February 21. I discredit Barclay's testimony that Shelton called him, as well as his (Barclay's) denial that he called Shelton on February 21.

I credit Shelton's testimony that during their telephone conversation Barclay told him he (Shelton) was to call in every day, and Shelton reminded him that was not the policy because he did not call in when he was out an extended time in 1988; that ''You only had to call in once if you were out for an extended illness.'' Barclay did not deny the latter discussion and I also credit Shelton's account because I was persuaded by his demeanor that he was testifying truthfully in this regard.

Shelton continued to testify that he then asked Barclay what did he want him (Shelton) to do, and Barclay said, ''OK on the morning of the day you are going to return to work, call me so I can schedule you back to work.'' Shelton said he told Barclay he would do that. Although Barclay denied he ever gave Shelton such instructions, I was persuaded by the demeanor of each witness (Shelton and Barclay) that Shelton was telling the truth and Barclay's denial was not truthful. I was further persuaded Shelton was telling the truth because Barclay's version defies logical practicality. Here, Shelton was on the telephone with the plant manager discussing when he was to call in and return to work, and in spite of the importance of that conversation and Barclay's concern about his absence, his calling in, and his return to work, Shelton would nonetheless not call in February 25, if he had not been told by Barclay to call him on the morning he was going to return to work, so that he (Barclay) could schedule him back to work.

If Shelton had not called in before he was going to return to work, without Barclay having so advised him to do so, he (Shelton) would have been asking for a disciplinary response by Barclay. At no time during the trial did I ever receive such an impression from Shelton that he would have assumed such a risk. However, throughout the trial I could not have been more persuaded by the demeanor of a witness, not to mention the overwhelming credited evidence of an antiunion motive, that Plant Manager Barclay was not a truthful witness regarding Shelton. Consequently, I credit Shelton's account and discredit Barclay's account of the February 21 telephone conversation.

Therefore, based on the foregoing credibility resolutions, I do not find that any changes are warranted in my decision of January 21, 1993.